24053

No. 727

To be argued by
C. W. WICKERSHAM, JR.

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United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 24053

UNITED STATES OF AMERICA,

Appellee,

—against—

PRIVATE BRANDS, INC., and FRANCIS P. CAREY,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR THE APPELLEE AND APPENDIX

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United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 24053

UNITED STATES OF AMERICA,

Appellee,

—against—

PRIVATE BRANDS, INC., and FRANCIS P. CAREY,

Defendants-Appellants.

BRIEF FOR THE APPELLEE

Statement

The defendants, Private Brands, Inc., and Francis P. Carey, appeal from judgments of conviction entered March 9, 1955 in the Eastern District of New York (Galston, D. J.) following a jury verdict of guilty on all counts of a twenty-one count indictment. The defendants were found guilty, in essence of fraudulently representing to the government that certain chloroform purchased by the government conformed to the standards of the United States Pharmacopoeia (hereinafter referred to as "USP") when in fact it did not.

The Indictment

Counts One through Five and Counts Eleven through Twenty-One of the indictment charge the defendants, Private Brands, Inc., and Francis P. Carey, with know-

ingly and wilfully submitting bills of the defendant Private Brands, Inc., to the Armed Services Medical Procurement Agency for payment, knowing them to contain false and fraudulent entries namely that they were for chloroform that conformed to USP specifications whereas in fact the chloroform delivered to the government did not conform to such specifications. Counts Six through Ten charge the defendants, Private Brands, Inc., and Francis P. Carey with knowingly and wilfully concealing by a device a material fact, that is, that a portion of certain chloroform shipped to the Armed Services Medical Procurement Agency consisted of chloroform which had previously been rejected by the agency for non-conformance to the USP specifications, and that they concealed this material fact by submission of bills of the defendant, Private Brands, Inc., which bills identified the shipments under a different lot number than that which had been rejected by the government (6a-21a).*

The Statute

All twenty-one counts of the indictment are predicated upon Title 18, United States Code, Section 1001.

Questions Presented

The questions to be determined on this appeal are:

I. Whether or not the Government established a prima facie case;

II. Whether or not Francis P. Carey, on the day of trial, had an absolute right to discharge his attorney and proceed pro se, although retaining the same counsel to

* References unless otherwise noted are to the pages of Appellants' Appendix.

represent Private Brands, Inc., of which he was president and sole stockholder, and whose interests were identical with his; and if this court holds he had such a right, did a denial of it constitute such prejudicial error as to require reversal;

III. Whether or not the rulings of the Court during the course of the trial concerning the admissibility of certain evidence constitute reversible error;

IV. Whether or not the indictment was multiplicitous in charging a separate crime for each false document submitted;

V. Whether or not the charge of the Trial Court contained such error as to require reversal when no objections or exceptions to the charge were noted by defense counsel; and

VI. Whether the Assistant United States Attorney committed prejudicial and reversible error in his summation.

The Facts

The appellant, Francis P. Carey, was the president of Private Brands, Inc. at the time of the events which occurred herein, and throughout the time of the trial. In 1952, he owned half of the common stock, but by the time the matter was brought to trial, he had acquired substantially all of the stock (110a-111a). Private Brands, Inc., during the period of time in question was in the contract packaging business, that is, they did not manufacture products, but packaged them for other concerns (232a). Carey also had an interest in another company,

known as the Contract Packaging Company, which was apparently engaged in a similar business (222a).

In the early part of 1952, the appellant, Private Brands, Inc., by its president, appellant Carey, entered into a contract with the Government for the sale to the Government of 25,824 one pound bottles of chloroform, which chloroform was to conform to USP specifications. This contract had a clause providing that the Government, at its option, could order a further equal amount at the same price (Ex. 1, Clause 37). The Government exercised its option and ordered an additional 23,619 bottles of chloroform under this contract (65a).

Private Brands did not manufacture chloroform, and on the date of the contract, according to its own books, had no chloroform of any type in stock (115a). On February 6, 1952, Private Brands purchased 27,950 pounds of technical chloroform* from E. I. duPont Company, to fulfill its contract with the Government, and thereafter bought an additional 27,950 pounds of technical chloroform from E. I. duPont Company, apparently to meet the Government's additional order.

DuPont's technical chloroform did not meet USP specifications, and at the time of the purchases by Private Brands, Inc., E. I. duPont Company did not manufacture USP chloroform. On March 19, 1952, Private Brands bought 3,000 pounds of USP chloroform from McKesson & Robbins, which was the only USP chloroform received by Private Brands from the time of the contract until after all chloroform had been delivered to the Government (119a).

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* The difference between "Technical Chloroform" and USP Chloroform is explained in Point I, below.

Private Brands received the chloroform in drums and bottled and labeled it in one pound bottles for shipment to the Government. The first 25,824 bottles were designated lot #2049, and samples of it taken by a government inspector for testing on February 18, 1952, prior to shipment, were rejected by the Government laboratory (133a-134a, Ex. 11).

Thereafter, new samples taken from a shipment designated as lot #2081 were accepted by the government after testing as conforming to USP specifications. The entire amount called for under the contract was then delivered, including both the 25,824 pounds originally required, and the additional 23,619 pounds which had been ordered by the Government under its option (177a-178a).

Delivery was made in sixteen shipments, and an invoice covering each shipment was submitted to the government. Each invoice was for a number of bottles "Chloroform, 1 lb. U.S.P." and on each invoice, Private Brands, Inc., by appellant Carey, certified that the bill was "just and correct" (177a-178a, Ex. 54).

After delivery, it was discovered that the chloroform shipped did not conform to USP standards (141a-142a) and an investigation was commenced (202a).

With respect to the 25,824 pounds of chloroform originally rejected by the government, the appellant Carey, told agents of the Federal Bureau of Investigation that he and several other named individuals had reworked and redistilled it before placing a new lot number on it (203a, Ex. 57).

The Government proved to the satisfaction of the jury, however, that this had not been done, but that a new label

had merely been pasted over the old label on the bottles of the non-conforming chloroform; and that appellants had given it a new lot number and had delivered to the Government the same chloroform, in the same condition, which the Government had originally rejected. The Government's evidence on this issue was conclusive, coming not only from the appellants' own employees who Carey had claimed had done the work (219a, 233a), but also from the work records of Private Brands, Inc. (114a) and from scientific chemical analysis of the chloroform (147a). The Government further proved that the appellant, Francis P. Carey had attempted to suborn perjury to prove his false defense (220a).

With respect to the 23,554 pounds ordered by the Government under the optional increase clause in the contract, and which did not conform to USP specifications, the Government proved that the only chloroform bought by the appellants in sufficient quantity to fill this additional requirement under the contract was the duPont technical chloroform which did not conform to USP specifications (83a), and further proved that this had not been redistilled (220a). The underlying theory of the Government's case, therefore, was that the appellant had given samples to the Government for testing which were not representative of the chloroform actually delivered.

Though several witnesses were called by the appellants, the appellant Carey did not take the stand.

POINT ONE

As there was substantial evidence of defendant's guilt, the verdict should not be set aside.

A. The Evidence Is to Be Viewed in the Light Most Favorable to the Government.

In *United States* v. *Manton*, 107 F. 2d 834, 839 (2d Cir. 1939), cert. den. 309 U. S. 664, this court stated that

> "In passing upon the sufficiency of the proof, it is not our province to weigh the evidence or to determine the credibility of witnesses. We must take that view of the evidence most favorable to the government and sustain the verdict of the jury if there be substantial evidence to support it."

See also, *United States* v. *Brown*, 236 F. 2d 403, 405 (2d Cir. 1956).

Again, in *United States* v. *Goldstein*, 135 F. 2d 359, 361 (2d Cir. 1943), the court, in affirming a conviction for conspiracy, said

> "In deciding on appeal whether the evidence supported the verdict all of it is to be considered in the light most favorable to the government and conflicts which can fairly be resolved in the latter's favor should be."

B. There Was Substantial Evidence of Defendant's Guilt.

The evidence upon which the Government relied was clearly substantial, and without any doubt supported the verdict of the jury.

Near the end of 1951, the Armed Services Medical Procurement Agency in Brooklyn sent out invitations to bid for a contract to sell 25,824 one pound bottles of USP chloroform to the Government (47a). The appellant, Private Brands, Inc. was the successful bidder of six who responded, and obtained the contract with a bid of $.35½ per pound for chloroform packed for the domestic market and $.36 per pound for chloroform packed for export (47a). The other bids ranged from $.369 to $.60 per pound (70a, 71a, 96a, Ex. 2). A notification of the award dated December 26, 1951 was sent to Private Brands, Inc., and on February 9, 1952, the formal contract (Exs. 5 and 19) was mailed to Private Brands (51a).

The contract contained a clause which permitted the Government, at its option, to require the seller to furnish additional chloroform up to an amount equal to that contracted for, at the same price (63a, 64a, Ex. 1, Clause 37). The Government, on February 20, exercised that option, and ordered 11,616 one pound bottles, and on March 4, 1952, ordered 12,048 bottles more (65a).

Private Brands, Inc. was in the contract packaging business (232a); it did not manufacture chloroform and had none on hand when its bid was accepted (115a). Rather, it bought the chloroform, which it delivered to the Government, in bulk from the E. I. duPont Company (118a), and bottled, labeled and packaged it for shipment under the contract here in question (237a-238a). This is proved by Exhibit 29, the Private Brands stock record (115a) which shows that from 1949 until February 6, 1952 Private Brands had no chloroform on hand. On that date it received 27,950 lbs. of duPont chloroform. It received 3,000 lbs. of chloroform from McKesson & Robbins on March 19, 1952, an additional 27,950 lbs. from duPont on

May 5, 1952 and no further chloroform until July 15, 1952 which was after the chloroform in question had been delivered to the government (Ex. 54).

Chloroform is a generic name for a chemical having $CHCl_3$ as its basic ingredient (237a), which is mixed with small amounts of other chemicals known as stabilizers, which protect the product against adverse effects of light, heat, air and conditions which might tend to decompose it (82a). USP chloroform must contain "not less than 99% and not more than 99.5% of $CHCl_3$, the remainder consisting of alcohol" (160a). Chloroform which does not conform to USP specifications is called "technical chloroform" and differs according to the specifications of each particular manufacturer (174a). The difference between USP chloroform and technical grade chloroform was explained by the Government expert, Max Feinberg, as follows:

> "A. The USP indicates the maximum degree of impurities permitted in these tests. It cannot exceed certain maximum impurities. If it does, it fails.
>
> The technical grade chloroform, the specifications vary from one company to another, to the point where I could not possibly tell you what impurities may be present in any one technical grade chloroform. To my knowledge, there is no set specification or no prepared specification which universally takes in technical grade chloroform" (174a).

The E. I. duPont Company at the time did not make grade chloroform to USP specifications (81a-82a) but made only technical grade chloroform which did not use any alcohol as a stabilizer, but used amylene in the ratio of between 2/100 of 1% and 3/100 of 1% by weight, and therefore had not only a different chemical content but

also a different specific gravity from USP chloroform (83a).

Not only did the chemical formula vary between technical and USP chloroform, but the price of USP grade was substantially higher (84a). USP chloroform required more refining than did the technical grade, and thus was more difficult to manufacture (84a). Thus, Private Brands, Inc. purchased the technical grade of chloroform from duPont at 16.2¢ per pound (118a), whereas the chloroform purchased from McKesson & Robbins, which was the only USP chloroform purchased by appellants, cost 30¢ per pound (119a).

The significant difference between technical grade chloroform and USP chloroform was that the technical grade would not be used medicinally, nor for any test in the United States Pharmacopoeia requiring chloroform, because of the inaccurate results it would produce if substituted for USP chloroform (154a).

Private Brands, Inc. bottled and prepared the first 25,824 pounds of chloroform for shipment to the Government and marked it lot #2049 (105a). The label for this lot also contained a stock number which was erroneous. On February 18, 1952, a Government inspector took five samples of lot 2049 (105a), and laboratory analysis of the chloroform showed that it did not conform to USP standards (59a). On March 5, 1952, the Government wrote Private Brands, summarizing the deficiencies in the chloroform, rejecting the material represented by the samples, and asking if new samples would be available before March 24, 1952. Besides non-conformance with USP standards, the chloroform was also rejected because it was mislabelled as to the stock number (61a).

Mr. Carey thereupon telephoned the duPont Company and asked for the results of tests that had been made on the chloroform purchased by Private Brands. The duPont Company notified Carey of the results of such tests (127a, Ex. 18). These tests showed that the chloroform did not conform to USP specifications (Compare Exs. 18 and 38 with 82a-84a). The letter written by duPont to Private Brands, Inc., to this effect (Ex. 18), together with the duPont invoices to Private Brands, Inc., which specifically state the Pure Food & Drug Administration requirement that the chloroform be labeled technical (Ex. 31) clearly establish Carey's knowledge that the duPont chloroform did not meet USP specifications.

On March 7, 1952, Private Brands, Inc. informed the Government that new samples would be available (62a). Thereafter, a Government inspector selected new samples marked Lot #2081 and turned them over to one of appellants' employees for mailing to the Government laboratory (106a). Upon receipt at the Government laboratory the samples were tested and accepted and the rest of the chloroform was delivered to the Government (177a-178a).

As the chloroform was used, complaints were received by the Armed Services Medical Procurement Agency that the chloroform had foreign particles in it (140a). Samples were sent in to the laboratory by the various medical depots and upon testing were found not to comply with the USP standards (142a). Further examination disclosed that all the bottles remaining in the medical depots which had been delivered as part of the first 25,824 bottles had a label designating the shipment as lot #2081 pasted over a label marked lot #2049 (180a-181a). The new label so covered the old that the exist-

ence of two labels was not readily apparent, as Exs. 21, 51 and 55 demonstrate.

The Federal Bureau of Investigation was then called in and agents interviewed the appellant, Francis P. Carey, who told them that all the cartons in which the original rejected lot of chloroform had been packed were opened and the bottles removed and placed on a drainboard over the top of a tank. He claimed that the tank was filled with activated charcoal, and that the chloroform was filtered and placed back in the same bottles with a rotary filler; and that the bottles were then capped, relabeled, and replaced in the cardboard carton from which they had been removed, and the carton was relabeled (208a-209a, Ex. 57). Carey claimed that he himself had reworked the chloroform on a weekend with the assistance of Robert Ehrlich, the production manager of Private Brands, Inc., and Anthony Carpanelli, who was in the employ of Ehrlich and Carey in a concern known as Contract Packaging Company.

Both Ehrlich and Carpanelli denied on the stand that they had participated in reworking the chloroform (219a, 223a). Ehrlich, however, testified that the appellant, Francis P. Carey, had asked him to tell the F. B. I. Agents that he and Carpanelli had assisted in reworking the chloroform, although in fact they had not done so (220a, 224a). He further testified that Carey had told him at the time of the relabeling that the chloroform had been rejected because of mislabeling, and made no mention of the chemical defects (244a). He added that after the notice of rejection, the bottles had been relabeled with the correct stock number as lot #2081, the second label being placed over the first, *and that nothing had been done to the contents of the bottles* (221a).

Carpanelli said that in 1952, he was employed by Contract Packaging Company, which was owned by Ehrlich and Carey (222a). However, he denied that he had at any time participated in any reworking, processing, or filtering of chloroform at Private Brands, Inc., or any place else (223a, 226a). He added that during one of Carey's visits to Contract Packaging Company, Ehrlich had told him to tell the F. B. I. that the chloroform had been reworked, and he had done so (224a).

In summary, then, the Government proved that the five shipments of lot #2081 were duPont technical alcohol; that it did not originally conform to USP specifications, and had not been reworked in any way. This was the cholorform for which Carey certified that five invoices describing it as USP chloroform were "just and correct" (177a), although he knew in fact that it did not meet USP specifications. These invoices were the basis of Counts One to Ten of the indictment, each constituting both a false statement and a device for concealing the fact that the chloroform had been previously rejected under lot #2049 as not up to specifications.

The chloroform purchased for the optional increase of 23,664 bottles was likewise duPont technical chloroform which was not received until May 5, 1952, two months after the Government had notified appellants that the chloroform tendered under lot #2049 (also technical chloroform) was unacceptable (116a). There was no contention that any of this was ever reworked to conform to USP specifications. The Government proved that it did not conform through both the duPont chemist (82a-83a) and the Government chemist who examined it after delivery (143a-144a). The eleven bills covering the eleven shipments of this chloroform form the basis of Counts

Eleven through Twenty-one of the indictment and each describes the chloroform shipped as USP chloroform, and is certified by appellants as being "just and correct" (177a-178a). There was, therefore, substantial evidence to justify the conviction of both appellants.

C. The Government Introduced Sufficient Evidence from Which the Jury Could Find That the Samples Approved Were Not Representative of the Chloroform Delivered.

Appellants' defense was that because the samples taken by the Government Inspector were approved, the chloroform, when delivered, must be assumed to have conformed to USP specifications. The Government, however, introduced evidence sufficient for the jury to find that the samples approved were not representative of the chloroform delivered. As has been explained above, the Government showed (a) that duPont technical chloroform had been purchased for the contract (118a) and (b) that such chloroform had not been reworked or changed from the condition in which it had been when rejected (221a). Tests by the Government chemist after receipt of the chloroform further confirmed that it was not USP chloroform (143a-144a). The inference is clear therefore that the samples submitted must either have been not representative of the lot delivered or had been incorrectly analyzed by the Government.

The Government proved that there was an opportunity for appellants to tamper with the samples taken. The inspector selected them at random but appellants omit to state, as the Government Inspector testified, that having selected them, *he turned the sample bottles over "to the contractor [Private Brands, Inc.] for mailing to the lab-*

oratory" (106a). In other words, the inspector did not take the samples with him to the laboratory, but left them in the possession of Private Brands, Inc., where it was possible for USP grade chloroform to be substituted from the 3,000 pounds purchased from McKesson & Robbins, for the samples which had actually been selected.

Further proof that the samples approved were not representative of the lot delivered was the fact that five bottles of chloroform were delivered to the Government as being representative of the first group of 25,824 bottles (lot #2081), only four of which were consumed in the testing at that time. The fifth bottle remained on the shelf until 1953, after complaints about the shipments had been received. At that time it was analyzed with other bottles delivered by Private Brands, Inc., but *though the sample bottle still met* USP standards, the other bottles did not (147a).

Additional evidence that the samples sent were not representative was the proof that although all the bottles of lot #2081 shipped to the Government depots had the new lot #2081 label pasted over the lot #2049 label, the sample bottle had only the label marked lot #2081 (Ex. 22). There was, consequently, adequate evidence for the jury to find that the samples were not representative of the shipments.

The defendants rely upon a decision of the Armed Services Board of Contract Appeals on an entirely different contract for chloroform delivered to the Government in December of 1952 (343a). There is no record here of what evidence was submitted in connection with that case, whereas the evidence submitted in the District Court clearly shows that at the time of delivery the chloroform

here in question did not conform to the specifications for USP chloroform.

D. There Being Substantial Evidence to Support the Verdict, the Judgment Should Not Be Set Aside.

In *United States* v. *Sicurella*, 187 F. 2d 533 (2nd Cir., 1951), this Court held that the verdict of a jury in a criminal case will not be disturbed unless it is without substantial evidence to support it.

Thus, even if this Court finds there is evidence to the contrary, the judgment should not be disturbed as there is substantial evidence to support it.

POINT TWO

The Trial Court properly sustained Government objections to evidence offered by appellants.

At the trial, appellants apparently wanted to prove that USP Chloroform could accumulate "sediment and flaky things" (300a) if allowed to stand for some time and if the contents of the bottle came in contact with the adhesive joining the cap to the seal (316a). Notwithstanding the fact that this was merely one of several defects noted in the chloroform delivered (134a) and therefore was in no way a complete defense, the court stood ready to receive such evidence provided that appellants showed that the chloroform which went through such a change was of a type similar to that delivered to the Government (e. g. 312a, 315a). It was for failure to prove this essential point that appellants' offer (which at most was a partial and not a complete answer) proved abortive.

The chloroform delivered to the Government consisted of 49,443 one pound bottles which were sealed with caps purchased from Ferdinand Gutman & Company (267a). The only available chloroform which could have been used to fill the orders was the 55,900 pounds of technical chloroform purchased from E. I. duPont Company (115a, 118a, 120a) and the 3,000 pounds of USP Chloroform bought from McKesson & Robbins (119a).

In their attempt to prove that the method of sealing the bottles caused deterioration of the contents, appellants asked questions which were improper because of an inadequate foundation, and even after the reason for the impropriety was pointed out and they were given an opportunity to lay the appropriate foundation, they failed to do so (e. g., 288a, 303a, 312a).

Thus, appellants' witness, Horvath, the Traffic Manager of Private Brands (289a), testified that in January of 1955 (i. e., on the eve of trial), he purchased one five-pound bottle and three one pound bottles allegedly of USP chloroform from the Fisher Scientific Company (287a). Horvath was not a chemist and did not know for a fact what was in the bottles (310a), but only that he got an invoice for USP chloroform (286a); nor did he know whether this bottle was sealed with a Gutman seal (286a).*

Horvath sent one bottle back to the Fisher Scientific Company, one to Bendiner and Schlesinger for testing, and kept the balance (300a). When the third sample which was marked "Merck USP" Chloroform was offered

* The assertions at page 27 of appellants' brief that the bottle was sealed with a Gutman seal appears to be based on material outside the record.

by appellants, the court properly sustained the Government's objection, holding that appellants had not competently proved the contents of the bottle. The court's ruling at 303a was as follows:

> "The Court: Yes. If you produce other evidence to connect with the sample received the statement that the invoice of Exhibit E accurately describes what is in that bottle and call representatives from the Fisher people to prove that, then I will consider the offer of this Exhibit F for identification in evidence."

Appellants thereafter appear to have abandoned their attempt with respect to this particular chloroform and recalled Horvath who testified that on April 10 or 11, 1952 he took a sample of the chloroform which had been processed and sealed with a sealable enclosure, and which was a part of that used to fill the government contract at that time, and sent it to Bendiner & Schlesinger for testing (308a, 309a). He admitted that he did not know what was in the bottles that he had sent (310a). Appellants then offered their expert witness for the analysis of this chloroform (Defendants' Exhibit L). The Government objected that there had been no proper foundation laid to connect it with anything in the case and that there was no evidence that the chloroform tested ever met USP standards. The court, however, received the evidence subject to connection:

> "The Court: But the connecting legal point has to be established that that sample which Mr. Bechtoldt analyzed and which is covered in this report is or was prepared in the same way and of the same substances as called for under the contract with the Government" (312a).

The defendants thereupon recalled Mr. Horvath for the third time. He could not remember the lot number of the bottle from which the chloroform was selected, to tie in the identification, and was completely unable to prove that the bottle was one of a shipment similar to that sent to the Government (315a). The defendants' expert, Mr. Bechtoldt, was then recalled and asked a hypothetical question to which an objection was sustained because of the incorrect characterization of the evidence (317a, 318a). He was then asked whether duPont technical chloroform would pass the USP test and over objection he was allowed to answer. He stated that chloroform with a specific gravity of 1.479 i.e., that of some of the chloroform delivered to the Government (Ex. 18) would not meet USP standards (319a-320a).

The appellants' brief, therefore, is completely in error in the statement of the facts. Horvath did not know whether the chloroform purchased from Fisher Scientific Company in 1955 was sealed with a Gutman seal or not (286a), and proof as to that bottle was immaterial. With respect to the bottle selected in 1952 and sent to Bendiner and Schlesinger, examination of the record shows that the defendants failed to prove that this bottle ever came from the shipment prepared for the Government, since the defendants' sole testimony to this effect was stricken as given in response to a leading question (314a). The significance of the evidence excluded, furthermore, has not been shown in appellants' brief.

POINT THREE

The Trial Court properly refused to allow the attorney for appellant Carey to withdraw on the day the case was called for trial.

The indictment in this matter was filed in the District Court on December 2, 1954, and on December 8, 1954 both appellants appeared represented by Jeremiah Driscoll, Esq. and pleaded not guilty before Chief Judge Inch. At that time, the Assistant United States Attorney notified appellants and their counsel in open Court that the Government would be ready and expected to go to trial some six weeks later; that is, on January 24, 1955 (ga3).* A week later, on December 15, 1954, appellants moved for an order permitting them to inspect the Grand Jury Minutes. This motion was heard by Judge Inch who denied it from the Bench on December 27, 1954 (1a), although a formal order denying the motion was not entered until January 7, 1955 (2a).

On January 14, 1955, the Government sent out notices that the case would be called for trial on January 24 (ga3). On that date the case was called and adjourned until January 27, 1955, at which time appellants, still represented by the same attorney, namely, Mr. Driscoll asked for a further adjournment and the Court, over the Government's objections set the case down for January 31st (ga4).

At no time during the discussions on January 27 was there any suggestion that appellants were in any way dissatisfied with their counsel or desired to proceed with-

* "ga" refers to Government's appendix.

out counsel (277a, ga1-5). Not until the case was forced on to trial did appellant Carey indicate any dissatisfaction with the attorney whom he had personally selected to represent him and his corporation and who had represented them for some seven weeks between the date of indictment and the date when they knew the case would be called for trial. Indeed at the time the case was called on January 27, 1955, appellants' attorney told the Court that over the weekend, he would examine certain records he wanted which were in the possession of the Government (ga4).

On January 31, 1955, the date the case was called for trial, appellant Carey sought to discharge Mr. Driscoll and act as his own attorney, but to retain Mr. Driscoll as attorney for the corporation of which appellant Carey was the president and substantially the sole stockholder (111a) and the interests of which were admittedly identical with his (42a). In other words he wished, in effect, to be both represented by an attorney and to act as his own counsel.

Carey was not an attorney, and the only excuse offered for his wishing to represent himself was that Mr. Driscoll did not have the technical knowledge to cross-examine the Government's expert witnesses on the technical aspects of the case (42a). The trial court, however, was apparently of the opinion that if appellant's motion was granted, it would cause further confusion and delay in the trial.

In addition, the trial court, having heard Mr. Carey speak, was aware of his speech difficulty which would have made the conduct of a trial well-nigh impossible. Since Mr. Carey had expressed no dissatisfaction with his counsel, and indeed wished to retain him to represent the

corporation with which his interests were identical, there was clearly no abuse of discretion on the part of the Trial Court.

While refusing to allow Carey to act as his own attorney, the Court, of course, permitted him to sit at counsel table and freely to assist Mr. Driscoll in working out the questions to be put to witnesses (43a) even where such conferences appeared to have resulted in prolonged delays (e. g. 242a). Mr. Driscoll, moreover, contrary to what appellant alleges, appeared to have a good grasp of the technical aspects of the case (e. g. 86a), and was admittedly competent to defend the corporation.

In *United States* v. *Mitchell,* 138 F. 2d 831 (2d Cir., 1943), cert. den. 321 U. S. 794, the defendant attempted to discharge his attorney after the jury had been sworn, but before the actual taking of testimony had commenced. There the Court said, at page 831:

> ". . . when a jury case is already on trial in a district with a crowded calendar such as obtains in the Southern District of New York, a continuance for the obtaining and indoctrination of new counsel would be disruptive of the court's business and could not be claimed under the circumstances except for rather exceptional cause."

In the instant case, although the jury had not yet been sworn, the matter was about to proceed for trial, and it was clearly within the discretion of the Trial Court to refuse to allow a defendant with a speech impediment to discharge an attorney and at the same time retain him to represent what was in effect his alter ego, i. e., the corporation.

In fact, in an earlier hearing in the *Mitchell* case, 137 F. 2d 1006, 1010 (2d Cir., 1943), the Court pointed out that:

> "The cases cited by defendant stress equally, as, indeed, they properly should, the right of an accused to act for himself and his right to have a lawyer assigned in his behalf. . . . Obviously, however, those rights cannot be both exercised at the same time."

In *United States* v. *Foster*, 9 F. R. D. 367, 372 (S. D. N. Y. 1949), the court (Medina, J.) refused to permit a defendant to discharge his counsel and sum up on his own behalf:

> "Thus, at the outset, it seems significant that neither the Constitution nor the applicable federal statute lend the slightest support to the claim that Mr. Davis may dismiss his counsel, and sum up in his own behalf, as a matter of right. The clear purport of the language just quoted seems to the contrary. One of the fundamental rights of defendants in criminal cases is the right to counsel. But the alleged absolute right, irrespective of the attendant circumstances, to dismiss counsel and carry on *pro se* is a quite different proposition. If such were the law, there would be a fertile field in which defendants in criminal cases could operate to frustrate justice and, under the aegis of an alleged constitutional or other right, resort to every bedevilment of the court and jury that the ingenuity of man could devise.
>
> "Thus, even in jurisdictions where a defendant may be heard 'in person, by attorney, or both' • • • courts have discretion to decide how defendant and counsel will conduct the case • • • and may regulate the

> defendant's right to be heard, to maintain order, prevent unnecessary consumption of time or other undue delay, to maintain the dignity and decorum of the court and to accomplish a variety of other ends essential to the due administration of justice, which are so various as to make it both unnecessary and unwise to attempt to specify and enumerate them all. • • •
>
> "In the federal courts, where a defendant has no right to be heard both in person *and* by attorney, it would seem clear that the control of the proceedings by the court is no less extensive. • • • And it has been twice held in this Circuit that a defendant in a criminal case has no absolute right to dismiss his lawyer."

It is clear, therefore, that not only did the court act within its discretion in refusing to permit Carey to discharge Mr. Driscoll, but also in not allowing Carey to undertake the cross-examination of government witnesses (277a). In *Overholser* v. *DeMarcos*, 149 F. 2d 23, 26 (App. D. C. 1945), cert. den. 325 U. S. 889, rehearing den. 326 U. S. 805, an appeal in a habeas corpus proceeding, the court declared:

> "During the hearing the petitioner was represented by counsel. Nevertheless the court permitted petitioner to conduct the trial while his counsel sat silent. This is an undesirable practice. Where a party is represented by competent counsel his case should be conducted by that counsel unless it becomes apparent that the interests of justice require the party's active participation *pro se*. Such circumstances are rare and were not present in this case."

POINT FOUR

The prosecutor's review of the evidence on summation contained no prejudicial error.

In his summation, the Assistant United States Attorney prosecuting the case reviewed the evidence, pointing out that the defendant had bought technical grade chloroform which did not conform to USP specifications, and had not re-worked it, but then came to explain how samples had been approved by the Government chemist, the one real hurdle in the entire case. The paragraph in which he explained it is set forth in appellants' brief as follows:

> "Now, I don't know how Mr. Carey got to the Agency the five new samples which bore Lot 2081, but I do know where it came from. I know that it was U. S. P. chloroform and I know that it came from McKesson & Robbins. If you will look at the exhibits in this case you will find that on March 19, 1952, exactly five days before the second group of samples were sent in to the laboratory, Mr. Carey obtained 3,000 pounds of U. S. P. chloroform from McKesson & Robbins. That is the source of the chloroform which he submitted as the second group of samples" (P. 34 of Summations, P. 29 of Appellants' Brief).

It is clear from reading this excerpt alone that the Assistant United States Attorney was not trying to indicate that he had any special knowledge, because he explains how his knowledge was derived. If there is any doubt on this score, it is completely dispelled by reading the entire summation which shows that he was merely

reviewing the evidence, which showed that the McKesson & Robbins chloroform was the only chloroform meeting USP specifications which was available to Private Brands, Inc. at that time, and further showed that the samples submitted to the Government laboratory for testing did meet USP specifications. The court's charge furthermore told the jury that what counsel said was not evidence (324a).

In context, the comments obviously were intended to be and were understood as a conclusion to be drawn from the evidence.

> ". . . The district attorney has the right to summarize the evidence and urge upon the jury all reasonable inferences and deductions from the evidence. It is not misconduct on his part to *express* his individual belief in the guilt of the accused if such belief is based solely on the evidence introduced and the jury is not led to believe that there is other evidence, known to the prosecutor but not introduced, justifying that belief.
>
> • • • • •
>
> ". . . it must be remembered that in the closing argument to a jury, the government attorney is an advocate, as is counsel for defense, and proper oratorical emphasis is denied to neither."

Henderson v. *United States*, 218 F. 2d 14, 19 (6th Cir. 1955), cert. den. 349 U. S. 920.

The summation is not objectionable just because the prosecutor used the words "I know". *United States* v. *Klein*, 187 F. 2d 873, 876 (7th Cir., 1951), cert. den. 341 U. S. 952.

There is no comparison between the instant case and *Berger* v. *United States*, 295 U. S. 78 (1935), cited by appellants, where the Supreme Court said at page 89:

> ". . . We have not here a case where the misconduct of the prosecuting attorney was slight or confined to a single instance, but one where such misconduct was pronounced and persistent, with a probable cumulative effect upon the jury which cannot be disregarded as inconsequential."

The Assistant United States Attorney was well within the proper bounds of summation, and appellants' attempt to assign his argument as error must necessarily fail in light of the authorities cited.

POINT FIVE

No error can be predicated on the charge of the Trial Court.

The Trial Judge commenced his charge to the jury by stating that the indictment was merely a charge and not evidence, and read the text of Title 18 United States Code, §1001, which appellants were alleged to have violated (323a). He explained the burden of proof and defined reasonable doubt. He commented on the character testimony, discussed the nature of the evidence, and told the jury that they were the sole judges of the facts (324a-325a).

He then read Counts One and Six of the indictment substantially in full and summarized the remaining counts (325a-329a). In commenting on the evidence, he read certain excerpts from Hendrixson's testimony and sum-

marized the evidence as to re-working of the chloroform. The jury was given the essential elements of the offense in the Court's charge and appellants raised no objections or exceptions to the charge. No reversible error was therefore committed.

A. There Was No Error or Deficiency in the Court's Charge.

1. The Court's Comments on the Evidence Presented Were Entirely Proper

Appellants complain of the quotation by the Court from the testimony of the Government witness Hendrixson. This quotation takes up less than two of the ten pages comprising the charge of the Court. The portion of Hendrixson's testimony which was quoted was, in substance, that the Dupont Company did not manufacture USP chloroform during the period in question, that Dupont technical chloroform differed from USP chloroform, and how it differed. As to these items, the evidence was uncontradicted. Certainly, appellants were not in any way prejudiced by this.

The Trial Judge made it clear that he was not taking the case from the jury and that they were the sole judges of the facts. He said:

> "One, you pass on the facts, you determine the facts, and neither what counsel may have said in their summations in respect to their understanding of the facts, nor indeed what I may say in my charge concerning what the evidence is, need conclude you. You are the sole judges of the facts.
>
> "Secondly, you also pass upon the credibility of witnesses." (324a-325a)

In so charging, he brought himself within the rule of *United States* v. *Chiarella*, 184 F. 2d 903, 908 (2nd Cir., 1950), vacated as to sentence, 341 U. S. 946 (1951), wherein the court stated that a judge may express his opinion of the evidence, "provided he makes it plain to the jury that they need not agree with him, which in the case at bar the judge did very explicitly in his charge."

2. The Court's Failure to Define "Wilfulness" and Explain Criminal Intent in the Absence of a Request to Do So Was Not Error.

In summation, counsel for appellants, after reading the applicable paragraph of Title 18 United States Code, §1001, to the jury, argued that there was "no scintilla of evidence, written or oral in this case which directly proves that Mr. Carey, the individual defendant, or for that matter the corporation, knowingly and wilfully made any false statement" (26). Counsel for the Government in answer pointed out that the evidence showed that the fraud was deliberate and intentional once appellants had knowledge that the chloroform did not conform to USP standards, and that Carey had endeavored to cover up and conceal his fraud through false statements of his own and those of Ehrlich and Carpinelli. Judge Galston read §1001 to the jury but was not asked to and did not define the words "wilfully and knowingly". However, he did read Counts One and Six of the indictment, including specifically that part which charged that the defendants did knowingly and wilfully use a false statement, "and that such statement was false and fraudulent as the defendants then and there well knew" (326a). The learned Trial Judge further explained that these Counts were substantially repeated in the other Counts (327a-328a).

The jury clearly knew that it could convict only if appellants knew the statements were false and deliberately made them with intent to deceive. It would therefore have been superfluous for the Court to have defined the words "wilfully and knowingly." The failure to do so was not error.

In *American Surety Co.* v. *Sullivan*, 7 F. 2d 605, 606 (2nd Cir., 1925), Judge Learned Hand said:

> "The word 'willful, even in criminal statutes, means no more than that the person charged with the duty knows what he is doing."

And in *United States* v. *Capitol Meats*, 166 F. 2d 537 (2nd Cir.), cert. den. 334 U. S. 812 (1948), a case involving a violation of the Emergency Price Control Act, the court said at pages 538 and 539:

> "Consequently, if it appears that the jury understood that the accused were guilty only if they knew that they were selling above the ceiling price, the essential element of the crime was submitted for determination by the jury."

Clearly, in the instant case, the word "willful" had no obscure meaning. The jury was well aware both from summations and from the statute and from the indictment, that they could not convict appellants unless they were convinced that the fraud was deliberate and intentional.

The Court read Count Six to the jury in which the meaning of "concealment by device" was so clearly spelled out in the indictment as read to the jury that any juror could follow and understand it (32ja-328a).

In *Wheeler* v. *United States*, 190 F. 2d 663 (D. C. Cir., 1951), the defendant urged that the jury was not adequately instructed on the elements of the crime, although the statute had been read to them. There the Court said:

> "This was sufficient. The language of this statute is clear and concise, it contains no words which are obscure, ambiguous or which are used in some restricted, special, or technical sense which the average layman cannot be expected to understand."

The same may be said of the statute at hand.

3. The Failure to Charge Presumption of Innocence Was Not Error in the Absence of a Request to So Charge.

After reading §1001 to the jury, the Court charged:

> "Now the burden of proving guilt is upon the Government, and that burden consists of proving guilt beyond a reasonable doubt." (324a)

There was no request by appellants for a charge on presumption of innocence and no exception was taken to the Court's failure to charge it. In *United States* v. *McGuire*, 64 F. 2d 489, 493 (2d Cir., 1933), this Court held:

> "The court in its instructions to the jury failed to mention the presumption of innocence. The omission was not called to its attention, nor was any exception taken. No reversible error has therefore been shown."

Appellants cite *Coffin* v. *United States*, 156 U. S. 432 (1895) in support of their argument. There, however, there was a specific request to charge presumption of innocence and a refusal to do so on the part of the Trial Court.

Finally, in *Spevak* v. *United States*, 158 F. 2d 594, 598 (4th Cir., 1946), cert. den. 330 U. S. 821 (1947), the Court held:

> "On the third question, it appears that the learned trial judge did not mention the presumption of innocence in his charge to the jury, although he did charge fully and correctly on the doctrine of reasonable doubt. No request was made of him to charge on the presumption of innocence, however, and no exception was taken to the failure to so charge; and it is well settled that such failure is no foundation for error on appeal in the absence of request or exception."

B. Appellants' Failure to Request the Charges Omitted or to Take Exception to the Charge as Given Bars Any Claim of Error.

Rule 30 of the Federal Rules of Criminal Procedure reads in part as follows:

> "No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection."

The reasons for this rule are well set forth in *United States* v. *Vasen*, 222 F. 2d 3, 5 (7th Cir., 1955), cert. den. 350 U. S. 834, where in affirming a conviction, the Court declared:

> "Rule 30 of the Federal Rules of Criminal Procedure, 18 U. S. C. A., prescribes the time and place for making objections to instructions. In the absence of compliance with this rule, defendants are precluded from reviewing the action of the court.

> • • • Other courts have consistently decided likewise. • • • This rule is, in its essence, the same as that of Rule 51 of the Rules of Civil Procedure, 28 U. S. C. A., as to which it has repeatedly been declared that 'the purpose of requiring objections is to insure that the trial judge may be advised of possible errors upon his part and to give him an opportunity to correct them. For this reason, any objection must be fairly and promptly directed to the trial court in order that errors may be avoided. • • • In other words the court must be given an opportunity to rectify any inadvertent wrongful charge, statement or ruling. • • • This reasoning applies to every instance of assigned error where the action of which complaint is made is such that, if called to the court's attention, it might have been corrected. This includes rulings in the course of the trial, comments of the court and instructions to the jury. In all such instances common fairness requires that before it can be successfully contended on appeal that the trial court has erred, that court must have been given an opportunity to rectify any inadvertent comment, ruling or instruction."

Appellants were represented by counsel and had full opportunity to avail themselves of this rule. They failed to do so, and therefore the omissions which they complain of may not now be assigned as error. The words of this Court in *United States* v. *Campisi*, — F. 2d —, decided on September 9, 1957, with reference to an omitted instruction, seem particularly applicable to the case at Bar:

> "The omission was at most an inadvertence. Had appellant requested such an instruction, or excepted on that ground to the charge as given, we have no doubt the trial judge would have supplied the omis-

sion and the verdict would have been the same. But no exception was taken, no such request was submitted and appellant's counsel indicated no criticism whatever of any part of the charge. To reverse on such a point as this would be a travesty of justice."

POINT SIX

The indictment is not multiplicitous.

Appellants urge that the indictment is multiplicitous because each false statement is alleged as a separate count. They contend that only one crime was committed since all the statements were made in connection with a single transaction.

A. Each Count Properly Charges a Separate Crime.

Sixteen invoices containing false statements were presented to the government for payment. Each of the counts one to five and eleven to twenty-one of the indictment was based on a false statement in a different document (178a, Ex. 54). It was necessary to prove a separate signature on each document. The documents bore nine different dates, and each covered a separate and distinct shipment. Each of the counts required proof of different facts, and each therefore properly set forth a separate crime. In *Doherty* v. *United States*, 193 F. 2d 487, 488 (10th Cir. 1951), the court stated:

> "The required test for determining whether two or more counts in an indictment charge separate offenses or only one is whether each count requires proof of a fact or element not required by the other."

In *Berg* v. *United States*, 176 F. 2d 122, 125, 126 (9th Cir. 1949), cert. den. 338 U. S. 876, the court affirmed a denial of a writ of error coram nobis brought in an effort to obtain a modification of sentence on the theory that an indictment which charged in separate counts the making of false entries on the records of an interstate carrier was multiplicitous, and held that

> "The falsification of the several entries was punishable in each instance as a separate crime. Each entry required proof of additional facts, in order to establish the separate crime, whether made on the same report or different reports."

In *United States* v. *Marzani*, 71 F. Supp. 615, 618 (D. C. D. C. 1947), affd. 168 F. 2d 133 (D. C. Cir. 1947), 335 U. S. 895, 336 U. S. 653, it was held that

> "Each count of the indictment charges an offense different from the others either from a standpoint of time when the alleged false and fraudulent statements were made or with respect to different governmental agencies. The test of double jeopardy through a multiplicity of counts is whether a conviction on one count and an acquittal on another would bring about a contradiction on the face of the verdict."

It is clear, therefore, that each of counts one to five and eleven to twenty-one states a separate crime.

Counts one to five charge the making of false statements, and counts six to ten charge concealment by device of the fact that the chloroform shipped under lot #2081 was the same chloroform that had been rejected under lot #2049. Counts six to ten obviously required elements of proof not necessary under counts one to five.

This court, in *United States* v. *Uram*, 148 F. 2d 187, 190 (2d Cir. 1945), upheld a conviction on both counts of a two count indictment, saying,

> "The charge that counts one and two are for the same alleged crime, is without merit. They state two separate and distinct fact basis,—one, that the loan was obtained on the misrepresentation that the proceeds would be used for reconstruction purposes, when they were to be used for other unrelated purposes, and second, the concealment of the fact that a prior loan was unpaid. One was a negative act. The other was a positive act. They did not even concern the same facts. As to the violation of separate statutes, since the same evidence was not required for the proof of each crime, both charges may be upheld, even though both crimes grow out of the same general transaction."

The instant case differs from *In Re Snow*, 120 U. S. 274 (1887), cited by appellants. There the offense of cohabiting with more than one woman at the same time was held to be a continuing offense and separate counts could not be alleged for each year of such cohabitation. It also differs from *United States* v. *Universal C. I. T. Credit Corp.*, 344 U. S. 218 (1952), where the court held, after examining the statutory history, that Congress intended that the violation of the minimum wages act to constitute one offense, i. e., a course of conduct, regardless of the number of employees not paid such wages.

B. By Failing to Object to the Form of the Indictment Prior to Trial, Appellants Waived Any Defects.

Prior to trial, appellants moved for inspection of the grand jury minutes, but made no other motions directed

toward the pleadings (1a-2a). The question of multiplicity was not raised untill after conviction.

Rule 12(b)(2) provides in part as follows:

> "Defenses and objections based on defects in the institution of the prosecution or in the indictment or information other than that it fails to show jurisdiction in the court or to charge an offense may be raised only by motion before trial. The motion shall include all such defenses and objections then available to the defendant. Failure to present any such defense or objection as herein provided constitutes a waiver thereof, but the court for cause shown may grant relief from the waiver."

Appellants having failed to raise objections to the form of the indictment prior to trial, are now precluded from so doing. *Anderson* v. *United States*, 189 F. 2d 202 (6th Cir. 1951). There the court said, at page 204,

> "In making four out of one offense the indictment is unduly split and multiplied • • • and if timely objection to the indictment had been made, it should have been quashed. However, no objection to the indictment was raised until the hearing in this court. The objection now made does not attack the court's jurisdiction nor assert that the indictment does not charge an offense. It should have been made by motion before trial. • • • Because of failure to present the objection as required, it is waived. Also since the sentences upon the four counts run concurrently, and since the five-year sentence imposed in each case falls within the statutory limitation • • • as a practical matter appellant's penitentiary term will be the same as though the crime had been charged

in one count. He is not prejudiced, and this contention has no merit."

Under the statute in the case at bar, appellants could have been fined $10,000 on any one count, and the appellant Carey could have been imprisoned for up to five years or both (18 U. S. C., §1001). However, appellants were each fined only a total of $2100.00 and the appellant Carey was given a suspended sentence and placed on probation for one year. This punishment was substantially less than that which appellants might have received for a conviction on only one count of the indictment. It is therefore evident that appellants have not been in any way prejudiced or subjected to an illegal sentence, and there is no cause for relief from the waiver. *United States* v. *Perplies*, 165 F. 2d 874, 877 (7th Cir. 1948).

CONCLUSION

The appellants had a fair trial. The evidence amply supported the verdict and the contentions of appellants are without merit. The judgments of conviction should, therefore, be affirmed.

Respectfully submitted,

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